IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 23RD NOVEMBER 2007 / 2ND AGRAHAYANA 1929

SA.No. 457 of 1994(D)

AS.6/1990 of SUB COURT, SULTHAN BATHERY
OS.79/1987 of MUNSIFF COURT, KALPETTA
.....

APPELLANT: 2ND RESPONDENT:PLAINTIFF:

P.T. KURIAKOSE, S/O.CHERIYAN,
AGED 75 YEARS, RESIDING AT
VATTATHIMOOLA, AMBALAVAYAL AMSOM AND DESOM,
BATTERY TALUK. (D I E D).- LRS IMPLEADED:

***ADDITIONAL APPELLANTS 2 TO 5 –**
LRS OF DECEASED SOLE APPELLANT:

A2. MARIYAM,
W/O.LATE ELAMBRATHOTTATHL CHERIYAN,

A3. SHEEBA ALIAS SARAMMA CHERIYAN, D/O...DO...

A4. SHEEJA ALIAS SALOMI CHERIYAN, D/O.....DO.....

A5. SHIJU ALIAS THOMAS CHERIYAN, S/O...DO.....

ALL ARE RESIDING AT KOLAGAPPARA P.O.,
PATTATHIMOOLA, (VIA) MEENANGADI, WYANAD.

(*ADDL.APPELLANTS 2 TO 5 ARE IMPLEADED AS LRS OF DECEASED SOLE APPELLANT AS PER ORDER DTD. 4/07/2006 IN C.M.P.NO.1232/2000)

BY ADV. SMT.PRABHA R.MENON)
SRI.A.P.CHANDRASEKHARAN) for Addl.Appellants
SRI.M.GOPIKRISHNAN NAMBIAR
SRI.K.PUSHPARAJAN

S.A.NO.457/1994

RESPONDENTS: APPELLANT & 1ST DEFENDANT:DEFENDANTS:
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1. ENGIKKAPALATTY MARIYAKUTTY,
W/O. KUNHAPPAN, AGED 48 YEARS,
RESIDING AT NELLIYODI, KAPAPD AMSOM AND DESOM OF
TELLICHERRY, CANNANORE (DT.).

2. ELAMBRATHOTTATHIL ANNAKUTTY,
D/O.P.T. KURIYAKOSE, AGED 28 YEARS,
P.O. BATTERY.

***ADDL.R3 TO R5 ARE IMPLEADED:**

R3. ELAMBRATHOTTATHIL VARGHESE,
S/O.LATE P.T.KURIAKOSE, RESIDING AT KRISHNAGIRI P.O.,
VIA.MEENANGADI, WYAND.

R4. ELAMBRATHOTTATHIL AVARACHAN,
S/O.LATE P.T.KURIAKOSE, RESIDING AT KOLAGAPPARA P.O.,
PATTATHIHMOOLA, WYANAD.

R5. KEECHERI ALEYAMMA KURIAN,
D/O.LATE P.T. KURIAKOSE, RESIDING AT AYIRAMKOLLI P.O.,
WAYANAD.

(*ADDL.RESPONDENTS 3 TO 5 IMPLEADED AND RECORDED AS LRS OF THE DECEASED SOLE APPELLANT AS PER ORDER DTD. 4/07/2006 IN C.M.P.NO.1230/2000)

BY ADV. SRI.GRASHIOUS KURIAKOSE for R1

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 23/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

M.SASIDHARAN NAMBIAR,J.

S.A.NO. 457 OF 1994

Dated 23rd November 2007

J U D G M E N T

Plaintiff in O.S.79/1987 on the file of Munsiff court, Kalpetta is the appellant. Respondents are the defendants in the suit. They are the daughters of the appellant. Appellant died subsequent to the filing of the second appeal. Other children of the deceased appellant were impleaded as additional appellants 2 to 5. Plaint schedule property admittedly originally belonged to the appellant. He executed original of Ext.A4 sale deed dated 5/4/1986 in favour of the daughters, respondents 1 and 2. Subsequently, Ext.A5 cancellation deed was executed on 8/5/1986 cancelling Ext.A4 sale deed contending that Ext.A4 was not executed as a sale deed but was got executed as a deed of security. The suit was filed seeking a decree for permanent prohibitory injunction restraining respondents 1 and 2 the vendees under Ext.A4 from trespassing into the plaint schedule property contending that under Ext.A4 sale deed

vendees did not derive any right and Ext.A4 was vitiated as it was got executed by the undue influence, misrepresentation and fraud. Second respondent daughter filed a written statement contending that she did not get executed Ext.A4 sale deed and she was not aware of the sale deed and is not claiming any right under the document and she did not pay any consideration. First respondent resisted the suit contending that Ext.A4 is valid sale deed and it was not vitiated either by fraud or misrepresentation or undue influence and it was executed by the first appellant after receiving the entire consideration shown therein and respondents 1 and 2 obtained possession of the property and therefore first appellant is not entitled to the decree sought for. Before the trial court only first appellant was examined as PW1. Exts.A1 to A5 were also marked. Respondents did not adduce any evidence. Learned Munsiff on the evidence accepted the case of appellant that he is an illiterate and old and did not execute Ext.A4 out of his free will as a sale deed and held that Ext.A4 was got executed by misrepresentation. A decree for declaration to that effect was granted. Respondents 1 and 2 were restrained by a permanent prohibitory injunction from trespassing

into the plaint schedule property. First respondent challenged the decree and judgment before the Sub court, Sulthan Bathery in A.S. 6/1990. Before the first appellate court, after the arguments were heard and appeal was posted for judgment, two applications were filed one for re-opening the appeal and the other for receiving the additional documents. Learned Sub Judge allowed both the applications and marked the additional documents as Exts.B1 to B9. Learned Sub Judge re-appreciated the evidence in the light of Exts.B1 to B9 and found that first appellant did not succeed in establishing the vitiating circumstances alleged in the plaint and dismissed the suit. It is challenged in the second appeal.

2. Second appeal was admitted formulating following substantial questions of law.

> 1) Whether first appellate court was right in accepting additional documents in the appeal when the available evidence on record was sufficient to pronounce the judgment and the appellant in the first appeal did not show sufficient grounds to accept them as additional evidence.
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> 2) Once it is shown that

> plaintiff is old and illiterate person suffering from serious ailments, is not the burden on the defendants to show that at the time of execution of Ext.A4 plaintiff had the capacity to understand the transaction and executed the document voluntarily with the full knowledge of the transaction.

3. Learned counsel appearing for appellants and first respondent were heard.

4. Before the trial court apart from first appellant, no other witness was examined either on the side of the plaintiff or the defendants. Defendants did not adduce any documentary evidence also. Learned Munsiff on that evidence accepted the case of PW1 and held that Ext.A1 is vitiated by misrepresentation. Correctness of that judgment was challenged before Sub court. Records of the first appeal reveal that after the arguments were heard and appeal was posted for judgment an application was filed to re-open the appeal which was posted for judgment to enable appellant in the first appeal to produce additional evidence and another application to receive documents as additional evidence. Orders in the application show that without applying the mind learned Sub Judge allowed the applications.

5. Under Rule 27 Order XLI of Code of Civil Procedure additional evidence can be permitted to be adduced only on satisfying the conditions provided under clause (a), (aa) or (b) of Sub rule 1 of Rule 27. Under Sub rule (a) additional documents could be received, if the appellate court finds that the documents were produced before the trial court but were refused to be admitted when they ought to have been admitted. Under clause (aa) additional evidence could be received if the appellate court is satisfied that notwithstanding exercise of due diligence, such evidence could not be produced or such evidence was not within the knowledge of that person or such evidence could not after the exercise of due diligence be produced by him before the decree was passed. Under clause (b) additional evidence could be received if the appellate court requires that document to enable it to pronounce a better judgment or for any other substantial cause. Therefore as of right, no party is entitled to produce additional document before the appellate court. Appellate court is not competent to receive such document as additional evidence if conditions provided under Rule 27 are not satisfied. If the documents sought to be produced were produced and

were refused to be marked by the trial court, and appellate court finds that they should have been admitted in evidence, the appellate court is competent to permit admission of the said documents as additional evidence. Documents which were not produced before the trial court, could be produced only if the said documents could not have been produced in spite of the exercise of due diligence by the party or those documents were not within the knowledge of that party. Appellate court is competent to receive the documents as additional evidence, if it finds them necessary to pronounce a better judgment. Unfortunately, first appellate court did not consider any of these mandatory conditions provided under Rule 27. Records do not show that learned Sub Judge had even considered the requirements provided under Rule 27. In fact the affidavit filed in support of the application to receive the documents is so casual that it does not contain any averments as to why the documents could not be produced before the trial court. In such circumstances first appellate court should not have received the additional documents and marked them as Exts.B1 to B9.

6. If that be the case, the question is whether

judgment of the first appellate court is sustainable. First appellate court appreciated the evidence of PW1 in the light of the additional evidence marked in the first appeal. Independent of those evidence, other evidence was not appreciated. In such circumstances once it is found that the first appellate court was not justified in receiving the additional evidence, judgment of the first appellate court cannot stand.

7. Learned counsel appearing for first respondent contended that subsequent event has to be considered. It was contended that even if Ext.A1 sale deed is not valid and it is taken that plaint schedule property belonged to first appellant, as he is no more respondents 1 and 2 also are the legal heirs entitled to inherit to the estate and if that be so, no decree for injunction could be granted against them being co-owners. Learned counsel appearing for appellant submitted that the deceased appellant had executed a Will and by virtue of that Will additional appellants alone have right to the plaint schedule property and therefore there is no impediment for granting a decree for injunction. Question of the devolution of the right of the deceased first appellant cannot be decided in this appeal, especially

when right claimed by additional appellants on the strength of a Will. If that be the case as it is found that judgment of first appellate court will not stand, because of the subsequent events, it is in the interest of justice to set aside the judgment of the first appellate court and to remand the suit to the trial court for fresh disposal in accordance with the law. Parties are entitled to adduce further evidence. Trial court has to dispose the suit on the evidence so adduced.

8. In the result, appeal is allowed. Judgment in A.S.6/1990 on the file of Sub court, Sulthan Bathery is set aside. O.S.79/1987 is remanded to the Munsiff court, Kalpetta for fresh disposal. Additional appellants are to be treated as additional plaintiffs and additional respondents as additional defendants. Trial court shall permit the additional plaintiffs to amend the plaint and defendants to file additional written statement. Parties are also entitled to adduce further evidence. Parties are directed to appear before the Munsiff court, Kalpetta on 19/12/2007. Send back records immediately.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.457 OF 1994

23rd November 2007

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